In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-951

In re Marriage of Morton

ROSALIE L. MORTON,

Petitioner,

v.

SUPERIOR COURT, LOS ANGELES COUNTY STATE OF CALIFORNIA,
COURT OF APPEAL STATE OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION ONE,
SUPREME COURT, STATE OF CALIFORNIA,

Respondents

MAURICE R. MORTON,

Real Party in Interest.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the unpublished opinion of the Court of Appeal, affirming the interlocutory judgment of the trial court; that a stay be ordered pending determination thereof; or, in the alternative this petition be treated as the jurisdictional statement on appeal and supersedeas issue pending determination thereof.

OPINION BELOW

Petitioner has exhausted all State remedies. The unpublished Opinion of Respondent Court is annexed hereto as A. Petitioner has requested of the Clerk of Respondent Court for Certification of documents and exhibits of record to be transferred to this Court as a single appendix, as permitted by the Rules of the Supreme Court of the United States. The record on Appeal, contained in the Clerk's Transcript, Reporter's transcript, exhibits, include the following items, referred to herein, but such items are not the whole of the record requested:

Judgment, interlocutory, of dissolution (C.T. (clerk's transcript as hereinafter referred) 360,368.) Memorandum of Intended Decision (C.T. 509); Request for findings of fact and Conclusions of law (C.T. 520); Proposed findings (C.T.521/537); Objections to proposed findings (C.T. 538/559); Interlocutory Judgment, findings of fact, conclusions of law as entered by the trial Court March 22, 1977 (C.T. 593/597); Notice of Appeal therefrom, and the whole thereof; Request for Stay Pending Appeal, and Order of Stay granted, as of March 24, 1977 (C.T. 605,606) the Unpublished Opinion of Respondent Court, annexed as A, trial Court D 869 439, 2nd Civ 52725, June 30, 1978; Petition for rehearing, July 17, 1978; Denial of Petition for rehearing, July 26, 1978; Petition for Hearing in the Supreme Court of California, August 10, 1978; Denial of hearing of the Supreme Court of the State of California, without hearing, September 7, 1978; Notice of Appeal to the United States Supreme Court, September 15, 1978; Petition for Certification of Federal Questions on Appeal, October 11, 1978; Denial October 12, 1978, without opinion by postcard; Petition for Writ of mandate, prohibition, certiorari supersedeas, stay or other appropriate writ, October 20, 1978; Denial thereof October 20, 1978; Application for additional stay

or declaration that original stay is in full force and effect, to trial Court and summary refusal on grounds of lack of jurisdiction, orally; Petition for Stay or Supersedeas to the Court of Appeals and denial October 12, 1978; Petition for Stay and denial thereof, Supreme Court of California, October 20, 1978; Application for Stay pending petition for Certiorari, to the United States Supreme Court, denied by the Honorable Justice of this Court, William Rehnquist, Circuit Justice for the Ninth Circuit District November 15, 1978; Petition for recall of the remittitur, November 14, 1978, to the Court of Appeals, denied summarily by postcard dated November 20, 1978.

JURISDICTION

The unpublished Opinion, annexed as A, of the Court of Appeal, Second Appellate District, Division One, State of California, on which a hearing was denied by the Supreme Court of the State of California on September 7, 1978, is the final judgment of the Highest Court in the State of California.

Petitioner's voluminous briefs and record on appeal include by statutory citations, specific designations, headnotes, citations, and authorities, reference to and argument on, the substantial Federal Questions stated herein.

Included therein, but not limited thereto, is the Substantial Federal Question raised as to §§ 4800,(a)(b), 5110 California Civil Code, and the prohibited State action as to restrictions on transmutation of property, of the Fox Pension and the High Knoll home, already decided by this Court, and to which Respondent Court refused to follow.

> *Free v. Bland*, 369 US 663,8 L. Ed.2d 180, 82 S. Ct. 1089
> *Wissner v. Wissner*, 338 US 655, 94 L. Ed.2d 424, 70 S. Ct. 398

Article VI, clause 2 United States Constitution
Treaty of Guadalupe Hidalgo, 1848 as amended
Articles VIII, IX
14th Amendment US Constitution

Respondent, Maurice R. Morton, in his reply brief, and in the record on appeal, has included no contrary authority nor argument, and has relied on scurrilous and vituperous statements as to petitioner, not of record, which apparently the Court of Appeal claims is adequate to support the interlocutory judgment, D 869 439, 2nd Civ 52725.

All State remedies have been exhausted.[1]

This Petition for the issuance of a writ of certiorari, to review that final judgment, and/or jurisdictional statement on appeal, is filed within the ninety day (90) period following entry of the denial of hearing by the California Supreme Court, on September 7, 1978.

On or about November 15, 1978, the most Honorable Mr. Justice William Rehnquist, associate Justice, of this Court, denied petitioner's application for stay of the sale of petitioner's home and the interlocutory judgment appealed from, pending this Court's determination on issuance of certiorari, and/or appeal.

Concurrent herewith, petitioner applies to this Court for issuance of a Stay of the judgment appealed from, and the whole thereof, pending determination by this Court of issuance of certiorari, and/or appeal.

The Jurisdiction of this Court is invoked under 28 USC § 1257 (1)(2)(3); 28 USC § 2103; and 28 USC § 2101(f)[2]

[1] *Cohen v. California*, 403 US 15, 29 L. Ed.2d 284, 91 S.Ct. 1780.

[2] The Court did not state that "independent" grounds existed nor were such the basis for the refusal.

The Substantial Federal Questions, as raised herein, were raised by petitoner, (hereinafter designated as Rosalie or Petitioner) in the record on appeal.

Respondent Court, in its opinion refused to consider or decide those issues concerning the Supremacy clause of the Federal Constitution, the 14th, 5th, and 9th Amendment to the US Constitution, Article 1 § 10 of the United States Constitution and the Treaty of Guadalupe Hidalgo, excepting as to its statement on pages 15 and 16 of the Opinion, as follows:

> "It is only to be expected that in more than two hundred and fifty pages of briefs, appellant would have raised some inconsequential issues. To the extent these issues have not been expressly addressed it should be noted that they have been considered and found totally lacking in merit."[3]

The statement of lack of merit as to substantial Federal Questions, already decided by this Court, must be interpreted as refusing to follow the mandates of this Court and the Supreme Law of the Land, a finding of validity of §§ 4800 (a)(b), 5110, 5125 of the California Civil Code, and the application and construction thereof, which is repugnant to the Federal Constitution whereby the conflict, with the State law, and the Federal Constitution, was resolved in favor of state law and arbitrary State action.

[3] Among those non meritorious issues was the substantial Federal Question that petitioner was prevented from impeaching Maurice, at trial, by the use of his own business records, letters, and documents signed by him as to particular transactions and monies, as found in California Evidence Code § 1235; and the use of those documents for substantive and impeaching evidence. This substantial Federal question was already decided by this Court in *Green v. California* 399 US 159. The question was presented both to the trial Court and Respondent Court on pp. 21,22 petitioner's closing brief, referring to the reporter's transcript where the court violated due process.

Further, the refusal of the Court of Appeal to issue, on application of Petitioner, a certification of Constitutional Questions an appeal to this Court, which procedure is of long standing and use in California, and the postcard denial of that request on the mere statement that the matter was determined on State law, does not negate those substantial Constitutional Questions presented by petitioner, but further supports their existance.

More than forty five years ago, the late Justice Holmes said:

> "I do not think the United States would come to an end if we [the Court] lost our power to declare an Act of Congress void, I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."
>
> Holmes, Collected Legal Papers, 295, 296

The total absence of independent State grounds on which the Opinion of Respondent Court can find support, prevents the State Court actions of refusing to consider and decide the substantial Federal Questions; refusing to issue a certificate of Constitutional Questions on Appeal to this Court; and claiming nonexisting State Grounds; whereby, the right of Petitioner to petition this Court for redress of greivances could be prevented.

Other substantial Federal Questions, as to the right of equal possession and enjoyment of property, not yet divided by this Court, mandate clarification.

I.

A. STATE ACTION CAN NOT DENY PETITIONER ACCESS TO THE UNITED STATES SUPREME COURT

The Judicial department of the state of California, as well as the other branches of California government, is

limited in the grant of unequal rights, to its citizens and residents, by the United States Constitution and the Treaty of Guadalupe Hidalgo, Articles VIII and IX, as amended (1848), both of which pre exist California statehood, its Constitution, and legislation.

> Article I § 10 United States Constitution
> Article II § 2 United States Constitution
> Article VI United States Constitution
> Article I § 26 California Constitution
> Article III § 3 California Constitution
> Treaty of Guadalupe Hidalgo, 1848

> As set forth in the opinion of this Court, *Hausenstein v. Lynham*, 100 US 483 (1800) at pp 489, 490.
>
> "It must be borne in mind that the Constitution, laws and Treaties of the United States are as much a part of the law of every state as its own local laws and Constitution. This is a fundamental principle in our system of complex national policy."

Unlike the claim, as to criminal law and the defendants thereunder, that California can grant greater rights under its Constitution and Statutes than afforded by the United States Constitution, in a civil proceeding, and the limited jurisdiction of a court in a proceeding in dissolution, California is prohibited from denying Federally protected rights to one of the parties wherein the other party is awarded more.

Rights guaranteed by the United States Constitution and the Treaty of Guadalupe Hidalgo, to petitioner, must be provided to her in the same manners, and equally as any other person, in California or the United States.

> *Shelley v. Kraemer*, 334 US 1, 92 L. Ed. 1161, 68 S St 836 [1949]

Any contrary determination by State action is prohibited and void, as are all determinations made by reason of judicial legislation.

Article III §§ 1,3, California Constitution
Articles 1,2,3.6 United States Constitution

Petitioner's claim of a violation of rights guaranteed to her by both the United States Constitution and the Treaty of Guadalupe Hidalgo can not be ignored on the grounds that the decision was made on State grounds of California, which clearly can not exist, independently.

This court has already spoken as to restrictions on transmutations, a substantial part of the prohibited state action complained of herein.

Free v. Bland, supra

Necessarily, the usual, and understandable, reluctance of this Court to interfere with legitimate state interests is not a prior consideration in the determination of the Substantial Federal Questions presented.

The enactment of the 10th Amendment of the Constitution did not, nor did it purport to, either grant additional powers to the States or dilute the prohibitions as to State action found in the body of the Constitution.

1 Annals of Congress 439 [1789]
3 J. Story, commentaries on the Constitution of the United States (Boston: 1833) § 1898
McCulloch v. Maryland, 4 Wheat (17 US) 316, 372, (1791)

Among those fundamental rights, not expressly enumerated in the Constitution, but a fundamental right guaranteed to petitioner, is access to this Court to have considered, on its merits, her petition for a review of prohibited State action, repugnant to her inviolate rights.

Shelly v. Kraemer, supra
Amendments 9, 14, United States Constitution
Griswold v. Conn, 381 US 479 [1965]
Palko v. Conn, 302 US 319, 325 [1937]
Regents of the University of California v. Bakke US, 57 L. Ed.2d 750, 98 S. Ct.

The sexual discrimintion in the California statutes complained of are more than suspect. Discrimination on the basis of sex, in the possession use, and present enjoyment of property, is prohibited by the Treaty of Guadalupe Hidalgo, which is not in conflict with the United States Constitution.

United States Constitution Article VI § 2

Preexistence of both the Treaty of Guadalupe Hidalgo, Articles VIII and IX and the United States Constitution, to the Constitution of California, and its statutes mandates that as Supreme Law of the Land they become an integral part of the Constitution and Statutes of the State.

Conflicts with the supreme law of the land cause sections 4800(a)(b) and 5110 California Civil Code to fall.

Ware v. Hylton (1797) 3 Dall (3 US) 199
Art VI § 2 US Constitution

In this, and any other dissolution proceeding, in the State of California, independent State grounds can not exist, and a substantial Federal Question is presented both as to such a claim of state grounds, or the existance thereof.

Respondent Court, is expressly prohibited from action other than the mandate of actual equal division of property, and the equal application of the laws.

California Constitution Art I §§ 1, 3, 7, 21, 26
United States Constitution Art III §§ 1,3
Regents of the University of California v. Bakke [1977] US 57 L. Ed.2d 750, S. Ct.
Stanton v. Stanton [1975] 421 US 7, 43 L. Ed.2d 688 95 S. Ct. 1373

B. PETITIONER HAS BOTH STANDING BEFORE THIS COURT AND JURISDICTION EXISTS BY THE SUBSTANTIAL FEDERAL QUESTIONS PRESENTED

Petitioner's, standing before this Court results, in part, from the refusal and omission of the Court of Appeal to deny the existence of the substantial Questions presented in petitioner's brief, and that Court's Opinion, wherein it is stated that decision was made on California law, which be circumstances and logic, necessitated the conclusion that the Court refused to consider the Federal Questions and found the State statutes free from taint of repugnancy as enacted, construed and/or applied, contrary to previous decision by this Court determined, by means of Judicial legislation, or prohibited by the separation of powers as stated in the Federal Constitution, to impose its own determination of what should be the law, or its application, prohibited by the Supremacy clause of both the United States Constitution and the California Constitution, resulting in the unequal protection and guarantees of the law, to Petitioner as stated in California Civil Code; §§ 4800(a)(b) 5110.

Under Article 6 clause 2 of the Federal Constitution, the importance to the state of its own law, if such exists, or the Court's determination as to what the law should be, is not material when there is a conflict with a valid federal law or guarantee by the US Constitution or the Treaty of Guadalupe Hidalgo.

Free v. Bland, supra

All of the conclusions, by reason of these facts, evidence petitioner's Standing before this Court and invoke this Court's jurisdiction under 28 USC 1257 (1)(2)(3), 28 USC § 2103 and 2102(f).

Regents of the University of California v. Bakke, supra
Shelley v. Kraemer, supra

The refusal of the Presiding Justice of the Court and/or of the Court to issue a Certificate of Constitutional Issues on Appeal, is itself a substantial Federal Question. The practice is of long standing in California and its denial, summarily, whether it is designated a right or a privilege, is so fundamental that the fourteenth Amendment of the United States Constitution requires that this Court review that denial.

Amendment IX United States Constitution
Griswold v. Conn [1965] 381 US 479
Palko v. Conn, 302 US 319, 325 [1937]
Whitney v. Calif [1927] 274 US 357, pp 360-362 incl. 71 L. Ed. 1095
Allenberg Cotton Co., Inc. v. Pittman, 419 US 20, 42 L. Ed.2d 195 as annotated at 780 et sec, 95 S. Ct. 260

Wherefore, where the Court of Appeal either passed on the Substantial Federal Questions presented and the application, and found in favor of the validity of the State statutes, or the Court refused to consider the questions presented, is itself a Federal Question subject to this Court's determination upon an examination of the record.[4]

[4] The certified copy of the notice of Appeal to the United States Supreme Court, and previously referred to, also contains request for certification to this Court the record on Appeal, which included all briefs, pleadings, and exhibits to date. An amendment thereto is now

Honeyman v. Hanan [1937] 300 U.S. 14, 81 L. Ed. 476, 57 S. Ct. 350

The numerous refusals by the Courts of California to certify the Constitutional Issues presented by petitioner on appeal to this Court, requires that Rosalie not apply to this Court for a continuance in another attempt to, in some manner obtain the certificate already denied. Nor, as the Courts of California are aware, can any statement or determination issue from the Courts by which it can be unequivocally stated that the decision was made on *independent* State Grounds. [Emphasis added.]

The guarded statements in the unpublished Opinion, the numerous summary denials by postcard, without explanation, and the express omission to state the decision on Federal Questions and designate State Grounds, presents that substantial Federal Question for this Court to determine, from the record on appeal.

Allenberg Cotton Co. Inc. v. Pittman, supra as annotated

This Court's rules, noting only those issues presented will be considered, necessitates the length of this petition in that the interwoven aspects of separate and community

filed herewith requesting certification of all transactions since the date of that notice and rulings made as to any motions or requests pending at that time. Other than the appendices required by the Rules of the United States Supreme Court all appendices annexed hereto are for purposes of clarity and expediency pending this Court's receipt of the record to be certified. On receipt of the certified record on appeal, requested by Rosalie, this Court will find the requisite Federal Questions raised, in the briefs, in the headnotes and Captions, in the case law cited and referred to with specificity in the appendices and the Petition for rehearing, the Petition for Hearing in the Supreme Court of the state of California; the writs of certiorari, mandate, prohibition, Stay, Supersedeas, and ancillary actions to date, whereby petitioner requests the appellate courts of California to consider the Federal Questions which are inherent to any Opinion of the Court in a proceeding for dissolution.

property, as ignored by the trial Court, and which contrary to the statement of Respondent Court in the unpublished opinion, is complex.

Rosalie further relies on this Court's power to notice "plain error" for purposes of issuance of the writ.

Vachon v. New Hampshire [1974] 414 US 478, 38 L. Ed.2d 666, 94 S. Ct. 664, rehearing denied

Further the length of this brief is required to illustrate the broad, and unlimited departures, taken by Respondent Court to support the void judgment and Opinion.

The web of discrimination, as first determined, and its snowballing effect, to support the void judgment, requires clarification, definition and unraveling.

STATEMENT OF THE CASE

For convenience and clarity, petitioner is designated as either petitioner or Rosalie; Real Party in Interest is designated as Maurice; the Court of Appeal, Second Appellate District, Division one is designated as Respondent Court, and the trial Court is designated as trial court.

A. BACKGROUND OF THE CASE

This case arose out of a proceeding for a dissolution of Marriage filed by Maurice May 15, 1975, and the trial court, in August 1976, awarded Maurice all of the community assets and most of Rosalie's separate property.

Rosalie and Maurice were married in the County of Los Angeles State of California on September 23, 1965, and it was a second marriage for each of the parties.

No children were born of the marriage.

Maurice came into the marriage with no real property and the only personal property, his clothing and a 1959

Pontiac Le Mans car. He was employed as a vice president in charge of business affairs and administration at Twentieth Century Fox film Studios, for the television division. (hereinafter called Fox)

The Opinion of Respondent Court is not incorrect in that it states he was earning over $42,000 yearly, in fact, by his own statement and testimony, he was earning $84,000 yearly. To date, what he did with the funds is unknown.

Maurice was also an attorney at law licensed to practice in the State of New York.

Immediately after the marriage, Maurice moved into Rosalie's separate property home on Canfield Avenue. (hereinafter called Canfield)

He also, unknown to Rosalie was crucially in debt in an amount of between $18,000 to $20,000, and was attempting to fend off execution by IRS, the State and his ex wife for over $75,000 of back alimony, on his salary at Fox.

Also, unknown to Rosalie, he was supporting, in style, his 30 year old divorced daughter who would not work, and during the marriage purchased for her three cars.

During the marriage Maurice kept exclusive control of the funds. He had accounts at about four banks, the location of which are unknown to Rosalie, and to which only Maurice and his secretary, Rose Branz, were signatories.

Also without consent, knowledge or authority of Rosalie, he authorized his secretary to forge Rosalie's name on Rosalie's separate property checks, and deeds to land, whereby, without her knowledge or consent, her land in Maine was sold, and Maurice delivered the funds to one of his banks. He gained control of her other properties and

rents issues and profits therefrom, by similar fraud.

Rosalie graduated from the University of Southern California School of Law in January 1965 and was admitted to practice in the State of California on June 7, 1965, whereafter she became employed as a deputy city attorney for the City of Los Angeles, State of California.

Immediately on her divorce, from Bernard Loveman, she married Maurice.

She came into that marriage with over $100,000 in property including a home on Canfield Avenue, which had a mortgage of about $19,000.

The divorce decree required Bernard Loveman to pay all expenses and payments on Canfield, including insurance and taxes for at least a year after the divorce.

The Canfield house was sold in December 1972 and the funds therefrom were, in part, utilized to purchase the home on High Knoll.

Rosalie and Bernard had three children, all of whom were supported by Bernard and have college and graduate degrees.

Bernard testified at the dissolution hearing, as to his support of the children, and also as to the pressing debts of Maurice. Bernard had him investigated by a detective service when he determined Rosalie was to marry Maurice. He did not tell Rosalie of his findingss, at that time. He also stated at no time did Rosalie accuse him of mismanagement or theft.

After an operation to remove a kidney stone in 1966 or 1967, Rosalie spent a couple of years in the private practice of law and in May of 1970 became employed by the County of Los Angeles, State of California, as a deputy district attorney.

She remains in that employment to date.

B. PROPERTY INVOLVED HEREIN AND THE DISPOSITION BELOW

1. The Fox Pension

By reason of his employment agreement with Fox, Maurice was entitled, on his retirement, after 14 years of employment, to participate in a pension plan. The facts are not disputed as to the plan.

As of May 1974, when Maurice was fired from Fox, he had been employed for the requisite 14 years. By the terms and conditions of the contract, Maurice had the exclusive and sole right to exercise one of three options under the plan, or none at all. In May of 1974, he unilaterally exercised option 2 which resulted in the receipt each month of $1083.67 to continue until his death, and on his death, should she survive him, he elected that the specific designated beneficiary Rosalie L. Morton receive $561 monthly until she died. Contrary to the opinion of Respondent Court, the annuity gift was to the sole designated beneficiary, and not a joint and last survivor — plan —.

By the terms of the contract, the gift of the annuity, and/or the assignment of that right, became irrevocable on the delivery, in writin by Maurice, of the exercise of the option, to the chairman of the plan, and payments commenced under the agreement. All conditions occured in May 1974, and Maurice has been receiving the whole of those payments to date. It is also uncontradicted that nine fourteenths (9/14) of that pension is a community asset.

Maurice had the sole right to designate the beneficiary, if any, and it need not have been a spouse.

Disposition by the trial Court

a. The trial court evaluated the matured, and income producing pension, on a speculative actuarial life of Maurice for 6.5 years from the date of a letter in March of 1975. The trial Court awarded all of that existing asset to Maurice.

b. The trial court, then evaluated the remainder annuity, to take effect on Maurice's death, in fact, for Rosalie's actuarial life expectancy of over 20.5 years after Maurice's death, actuarially; ruled Maurice had made a gift to Rosalie of less than one half thereof, and awarded Maurice one half of that remainder interest, which was ordered to be paid to him forthwith by the sale of Rosalie's home.

Rosalie was awarded no existing community asset in lieu thereof, and was awarded only a share of her own separate property, the remainder, which may never accrue.

2. The unmature County Pension

By reason of her employment with the County, and the provisions of the statutes which were enacted by the legislature as to county pension plans, rights in that county pension, to which it is mandatory that Rosalie contribute each month, will not mature until sometime in 1980, possibly June, when Rosalie, having been employed for ten consecutive years and contributing to the plan, could retire.

Until that time, many factors could prevent maturation including death. Leaving employment, being fired for cause, a change in the legislation, illness, or Rosalie could just quit work and take her contribution to the plan.

If nothing prevents maturation, in June of 1980, Rosalie alone, by reason of the terms of the employment agreement, of which the pension is an integral part, can determine the direction the plan is to take, decide which if any option she desires to exercise and has the sole right to designate the beneficiary under the plan.

Rosalie has the sole right to designate that beneficiary for survivorship and it need not be a spouse.

Disposition by the Court

a. Without apportioning the unmature pension as to separate and community property, the trial court evaluated the whole of the pension on Rosalie's actuarial life expectancy of 20.5 years after Maurice's death and awarded to him one half that amount. Maurice's share was to be paid to him immediately, and no existing or contingent community asset was awarded to Rosalie in lieu thereof.

b. Payment of this sum to Maurice immediately was to be accomplished by the sale of Rosalie's High Knoll Home.

3. High Knoll

High Knoll was purchased in June of 1973. The deed reads on its face as follows:

> ". . . . to Maurice R. Morton and Rosalie L. Morton, husband and wife, as joint tenants, not as tenants in common; not as community property."

It is uncontradicted, and testified to by Maurice's business manager, Lee Winkler, who contrary to the Opinion of Respondent Court, was not Rosalie's business manager at the time of acquisition, the community was insolvent and near bankruptcy.

The unpublished Opinion of Respondent Court refers to his testimony wherein he states, he told them not to purchase the home they did not have the money.

Esther Kascle, an attorney at law and a C.P.A., with a masters degree in tax from the University of Southern California School of Law testified she traced the funds for

the purchase from separate savings accounts of Rosalie's from the sale of her separate property Canfield house, and other separate property rents issues and profits therefrom. That the funds were delibertely kept in separate savings accounts by Rosalie, not commingled with any other funds not even each other, These funds were directly traced to the purchase of High Knoll and the escrow.

Further, her accounting showed, and it was agreed to by Maurice's business manager Winkler, that before and after the purchase of High Knoll, the community was insolvent and near bankruptcy. Had there been an income tax refund of about $10,000, as Maurice claimed, it would have been inadequate to pay all of the obligations of the community.

The exhibits and reporter's transcript, certified on appeal, exhibits A-VWV (quadruple V) inclusive) and exhibits 1-12 inclusive support this uncontradicted evidence.

In August of 1975, a year before trial in this case which occurred in August 1976, Maurice executed a deed which stated "Maurice R. Morton quitclaims, transfers, devises grants, etc all right title and interest in the real property at 15601 High Knoll Road, Encino California to IRWIN R. MILLER, IN TRUST for Carolyn Rosales."

At the time of trial, both Maurice and his attorney of record, Irwin R. Miller concealed from the trial Court and from Rosalie the existence of this deed.

It was discovered by Rosalie in June of 1978, when thereafter, it was attached first to the petition for rehearing in Respondent Court and then to every pleading, petition or document filed thereafter.

Disposition of High Knoll by the Court

Without finding value, at the time of trial, or at any time thereafter until this time, the trial Court ordered the sale of High Knoll; ordered that Maurice was to receive the first about $28,000 of the proceeds therefrom; then the encumberances of record were to be paid; then Maurice was to receive moneys he claimed to have expended on community obligations, to be determined, and if anything remained it was to be divided after payment of costs of sale.

Rosalie has paid substantial community obligations including Income tax obligations due at time of separation, all of the first and second mortgage payments on High Knoll, the insurance, the improvements, the installation of new appliances, the taxes, the maintenance,and improvements, from February 1975.

4. The Insurance Policys (Equitable)

Rosalie is the designated beneficiary/owner of an insurance policy on the life of Maurice. The policy arose because Rosalie, after encumbering her Canfield home to loan some money to Maurice to pay pressing debts and avoid execution, was afraid she would not be able to continue to make the additional payments on her home.

Maurice obtained the policy and also delivered to Rosalie his holographic will whereby it is stated that all insurance policies on which Rosalie is owner/beneficiary were paid for by her sole and separate property.

Disposition by the trial court

The trial Court determined and ruled that the policy had no value and awarded the whole thereof to Maurice. The Equitable life assurance policy pays dividends of about a little over $200 twice a year.

Insurance Policy, Fox

The employment agreement and pension plan, as an integral part thereof, included an insurance policy on Maurice's life, on which Rosalie was the designated beneficiary. After separation, Maurice changed the beneficiaries to his sister, his secretary Rose Branz and Carolyn Rosales.

The trial court rules it was his sole and separate property.

5. Gift of community funds and secreted funds

The trial court ruled that Maurice could give his adult daughter $150 weekly, and pay all living expenses for her, without Rosalie's consent. Further that court stated that not only did Rosalie have the burden to show that funds had been in existence and they were not accounted for, she must also show they are still in existence, where they are, and the use put to them by Maurice.

SUBSTANTIAL FEDERAL QUESTIONS PRESENTED

As to the fully vested and matured Fox pension, paying 1083.67 monthly since May 1974:

1. Does equal divison as mandated in § 4800 California Civil Code require

a. Equal division each month as it is due and payable, from date of separation to guarantee the equal right of possession, use, and enjoyment.

b. Can either a common asset, which may never mature, due to its contingent nature, or petitioner's separate property be awarded in lieu of a division of an existing asset and comply with the equal property rights guaranteed by the Supremacy Clause.

c. Are specific guideline required in Section 4800(a)

(b) as to division of community assets, or can the legislature delegate to the court, in each case, to do what it deems "proper" thus ambiguously and unequally applying federal mandates.

2. Does the supremacy clause of the United States Constitution prevent restrictions on the transmutation of the contingent remainder of the Fox pension, which became irrevocable on delivery of the writing to the chairman of the plan and commencement of payments under the plan in May 1974.

a. Does the failure to apportion the contingent annuity as to common and separate interests violate Federal Constitutional restrictions on transmutation, and deny the guaranteed rights in property.

b. Can the court remake the obligations of the contract or interfere in Rosalie's rights thereunder, as to the irrevocable gift of the contingent remainder, or is that prohibited state action by reason of Article 1 § 10 of the Federal Constitution, and rights of property by reason of the Federal Constitution and Treaty of Guadalupe Hidalgo.

3. Where the face of a deed expressly states the property is not community property, is the state prohibited from restrictions as to transmutation of property

a. Can a presumption on a deed be applied differently as to each case as the court deems "proper" or is such application prohibited as taking of property and denying the equal protection of the laws.

b. Can the court engage in judicial legislation and application of the wrong presumption whereby it obtains jurisdiction over separate property, or is such state action void by the supremacy clause of the Federal Constitution.

c. Can the state construe or apply the law of the state, in its discretion without guidelines, so as to deny Rosalie

the equal protection of the laws whereby her property, not subject to the jurisdiction of a court in dissolution proceedings, is taken.

4. Can the court deny stay pending appeal, unequally to petitioner or deny to petitioner certification of federal issues on appeal, to prevent access to the United States Supreme Court and to enforce a void judgment, whereby Rosalie's property is taken by prohibited state action repugnant to the constitution.

5. Can the court deny petitioner rights of discovery of hidden defenses, impeachment, the requirements of substantial evidence, and thereby a fair trial, or is such state action prohibited by due process and the 14th amendment of the United States Constitution.

6. Can respondent court refuse to consider or decide the Federal Questions presented in the record and briefs on appeal, or refuse to issue a certificate of the federal issues or is access to this Court to prevent prohibited state action guaranteed by the supremacy clause.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The substantial text involved in the Constitutional provisions involved, and statutory law and Treaties, petitioner, as permitted by the Rules of the Supreme Court of the United States appended hereto those provisions, has, excepting as expressly set out in this petition, and marked that appendice B.

WHY THE WRIT SHOULD ISSUE AND/OR THE APPEAL BE GRANTED

This case, for the first time, presents to this Court, the mandates, prohibitions and the extent of jurisdiction, conferred or denied to the State of California by the United

States Constitution and the Treaty of Guadalupe Hidalgo as to community assets, and what constitutes equal division.

It further presents the questions, previously decided by this Court, contrary to the State Court decision, of substantial Federal Questions of due process of law, and the state restrictions on transmutation of property.
on which specific and delineated guidelines are required to be set, and adhered to by the Courts of California, in the limited jurisdiction of a proceeding in dissolution.

It is only for the fact that Rosalie is an attorney at law, and has the aid of numerous friends, and her counsel of record in the State Court, each of whom have expended limitless time and effort, without compensation, is it possible to present the issues to this Court.

The stability of property, and interests therein, in the State of California, necessarily compels that this Court consider the effects of Judicial legislation, the lack of specific guidelines in State legislation, the prohibited delegation of legislative duties and powers to the "discretion" or "proper" inclination of the Court, whereby each person and citizen in California is not equally afforded the rights, privileges, and benefits conferred by the law and guaranteed by the Treaty of Guadalupe Hidalgo and the United States Constitution on dissolution of marriage.

A. SECTION 4800(a)(b) CALIFORNIA CIVIL CODE IS REPUGNANT TO THE FEDERAL CONSTITUTION AND THE TREATY OF GUADALUPE HIDALGO, AS ENACTED, AS CONSTRUED AND AS APPLIED AS IT RESTRICTS TRANSMUTATION OF COMMUNITY PROPERTY AND DENIES THE RIGHT TO OWN, POSSESS, AND ENJOY SEPARATE PROPERTY, AND PERMITS PROHIBITED STATE ACTION IN INTERFERENCE OF EXISTING CONTRACTUAL RIGHS. THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION PROHIBITS STATE ACTION PREVENTING TRANSMUTATION.

As to the irrevocable assignment, and gift, of the annuity remainder,under the Fox pension, contrary to the Opinion of Respondent Court, without authority therefore, transmutation was completed in May of 1974. The contingent remainder, as Rosalie's separate property, was not subject to the jurisdiction of the trial court, to evaluate nor to award to Maurice.

Had the funds for acquisition of High Knoll been community funds, which is clearly not the case here, the face of the deed, which was caused to issue in that form alone by Maurice and his business manager, and the transmutation of community to separate property, as shown on the face of that deed would, by the law of California deliver to Rosalie, as a joint tenant, with survivorship rights, three fourths of that real property.

Johnson v. Johnson (1963) 214 Cal. App.2d 29

Dunn v. Mullan (1931) 211 Cal. 583, 77 ALR 1015

Robinson v. Robinson, (1944) 65 Cal. App.2d 118

Free v. Bland, supra

Wissner v. Wissner, supra

California Civil Code § 5110

Restrictions on transmutation and gifts by Maurice to Rosalie are prohibited by the Supremacy clause of the Federal Constitution.

Free v. Bland, supra

The deed by which High Knoll was acquired in 1973 states as follows:

> ". . . . . to Maurice R. Morton and Rosalie L. Morton, husband and wife as joint tenants, not as tenants in common, not as community property."

And, the contrary intent that the property be held as separate and not common property is on the face of the deed.

Contrary to the Opinion of Respondent court, "the face of the deed presumes the property is community," the face of the deed presumes separate property, and transmutation complete.

Separate property is clearly defined by section 5107 California Civil Code and Article I § 21 of the California Constitution, each of which are annexed hereto as B, and specify that a gift during marriage is separate property.

The remainder annuity of the vested and matured Fox pension, which the Respondent Court refers to as an irrevocable gift, became irrevocable on commencement of the payments of $1083.67 monthly in May of 1974, after Maurice had unilaterally elected, in writing option 2 of the Fox plan and delivered it to the chairman of the plan also on that date, by the terms of the agreement.

The definition of a gift and its irrevocability is found in §§ 1146 and 1148 of the California Civil Code. It is not crucial to any decision whether the "irrevocable gift" was also an assignment of an existing right, whereby Rosalie was either a donee beneficiary, or an assignee, and thereby a party to the Fox Pension agreement, as to the annuity remainder.

Art. I § 10 United States Constitution

California Civil Code § 4800 (a)(b) requires that the Court, on dissolution of a marital community, to divide the community property equally; evaluate the assets, for division, at time of trial, "as practicable"; and include in the mandatory division the debts and liabilities of the parties.

A Court, in a proceeding for dissolution has no jurisdiction over the separate property of parties.

> *Johnson v. Johnson,* (1963) 214 Cal. App.2d 29
>
> *Robinson v. Robinson* (1944) 65 Cal. App.2d 118

The legislation sets no guidelines as to the division of existing assets and/or division of contingent assets which may never accrue. But, in section (b)(1) the statute permits the award of any asset to one party as the Court "deems proper" to effect a "substantial" equal division which legislative duty to set clear standards is improperly delegated to a court's "discretion."

And (2) permits the award from a party's share of an "existing" assets to be awarded to the other spouse, if misappropriation has been found. Whereby the existence of both existing and contingent assets were contemplated by the statute for division. But no guideline as to division and award of existing and contingent assets, or if an illusory asset is equal to one for existence and paying each month.

Dissolution necessarily ends any alleged state interest that the husband spouse have exclusive management and control of the common property, which until legislation of 1975, was mandatory on the wife spouse.

California Civil Code § § 5103, 5125

The intent of the legislation to preserve the equality in

the rights in property, without discrimination as to sex or person, and conform the statute to the guarantees of the Treaty of Guadalupe Hidalgo and the California Constitution Art. XI § 14, the act of Arp. 17, 1850, Cal. Stats. 1849-50 c. 103 p. 254 California Constitution 1879 Art. XX § 8, and the directive therein to the legislature to pass laws more clearly defining the rights of married women in "separate" and "common" property as mandated is evidenced in most of the legislation to date.

California Civil Code §§ 5104, 5105, 5107
California Constitution Art. I § § 21, 26
Treaty of Guadalupe Hidalgo, as amended (1848)
Articles VIII and IX

Reluctance and refusal by the Courts of the State of California, to this date, has resulted in a substantial number of those Federal Questions having been already decided by this Court.

Yiachos v. Yiachos, 376 US 306 (1964)

Stanton v. Stanton, 421 US 7, 43 L. Ed.2d 688, 95 S. Ct. 1373

Wessner v. Wessner, supra

Not until 1975 did the California legislature determine that a wife's interest in community property was subject to her equal control, rather than mandatory control and management by the husband spouse, without exceptions.

Wilcox v. Wilcox, (1971) 21 Cal. App.3d 457

Though since 1975, she was a person entitled to the equal privileges and immunities afforded citizens of a State and the United States has not been denied, but only inferentially and reluctantly affirmed, by the State of California.

14th and 5th Amendment United States Constitution

All rights of liberty, property, equality, and all privileges and rights, which are purportedly to be guaranteed in proposed amendment to the United States Constitution, XXVII, already exist in California, and have existed since the Treaty of Guadalupe Hidalgo was adopted, as amended in 1848.

Neither the Courts of California, nor the legislature will recognize the full extent of the existing rights, and, as to those recognized by the legislature, the Courts of the State refuse to consider, and/or guarantee and deliver.

This Court alone has the Constitutional mandate to review that prohibited State action, repugnant to the Constitution of the United States, and the Treaty of Guadalupe Hidalgo. And, the reuluctance of this Court to interfere must succumb to the greater mandate and duty to resolve the substantial Constitutional Questions Presented.

B. THE SUPREMACY CLAUSE PROHIBITS STATE ACTION, WHEREBY ROSALIE'S RIGHTS IN THE ANNUITY CONTRACT ARE IMPAIRED.

Article 1110 U.S. Constitution

AS TO THE FULLY VESTED AND MATURED FOX PENSION PAYMENT MONTHLY OF $1083.67 SINCE MAY 1974

I.

EQUAL DIVISION CAN NOT BE ACCOMPLISHED BY THE AWARD OF THE WHOLE OF THE EXISTING ASSET TO MAURICE, AND THE AWARD TO ROSALIE OF EITHER HER OWN SEPARATE PROPERTY OR AN ASSET, WHICH

BY ITS CONTINGENT NATURE MAY NEVER ACCRUE AND LEGISLATIVE STANDARDS MUST BE DETERMINED AND CAN NOT BE DELEGATED TO THE COURTS TO DO WHAT IS "PROPER" ON A CASE TO CASE BASIS

Rosalie's property rights in the Fox pension payment monthly of $1083.67, is one half the 9/14 community property interest, which Maurice has received exclusively and used solely for his own benefit since May 15, 1975. The Supremacy Clause of the constitution guarantees her interest and rights in that property as equal to and coexistent with that of Maurice.

By the law of California and the Treaty of Guadalupe of Hidalgo, she takes, and is entitled to her share of the payments, as they come due each month, as an owner and not a creditor.
control one's proerty, is the right that Rosalie have the liberty of its use and enjoyment each month as it comes due. The right to will it, spend it, and/or give it away as she sees fit. Discrimination can not exist whereby she does not have the same and equal rights.

This Court has previously decided the substantial Federal Questions which guarantee Rosalie's rights in the community share of the pension as vested and equal, and prohibits state action which is discriminatory, or repugnant thereto on the basis of sex or unequal application of the laws.

Yiachos v. Yiachos 376 US 306 (1964)
Stanton v. Stanton (1975), *supra*
Kelley v. Johnson (1976) US, 42 L. Ed.2d 387, S. Ct.
Shelley v. Kraemer,supra

The Question presented is the non discriminatory equal immediate use and enjoyment of such property.

The division of property, on dissolution, without standards requiring existing assets and contingent assets to be divided in kind, result in, and has resulted in, the award of the whole of the existing pension and the payments thereunder to Maurice, and none of that asset to Rosalie.

Rosalie has been denied her right of enjoyment, possession and use of her share, and, if Maurice does not die in August of 1981 or Rosalie predeceases him, she will never receive any portion of that property, even her separate property annuity.

The award of an illusory asset[5] or one that may never exist, in compensation for a present existing asset, is not the equal division and rights in property guaranteed by the United States Constitution and the Treaty of Guadalupe Hidalgo.

Cohens v. Virginia 6 Wheat (19 US) 264, 404 (1880)

The lack of standards in the legislation, whereby existing and contingent assets must be divided in kind, renders § 4800 (a)(b) repugnant to the Constitution and Treaty.

State infringements, by legislation or the application thereof, whether deemed incorporated protections in the fourteenth amendments to the Constitution or the absolute rights afforded by the Treaty of Guadalupe Hidalgo, on Rosalie's property rights, must fall by Supremacy Clause of the United States Constitution.

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[5] Actually, as discussed infra, Rosalie was awarded no community asset in lieu of the award to Maurice of the Fox pension; the Opinion of Respondent court, contrary to the law of California, Calif. Civ. Code § § 1148, 1146, was compelled to judicially legislate by the statement "it can not be said as a matter of law a gift of the remainder was Rosalie's separate property." Wherein, Rosalie was awarded a portion of her separate property of the remainder interest in lieu of the community asset. Discussed infra.

Nor does the doctrine of separate but equal rights apply here any more than in the facy of any other discriminatory prohibited State action.

Shelley v. Kramer, supra

An argument of strict construction would require the same results as incorporating in section 4800 Calif. Civ. Code, the necessity for a division by kind whereby the risks are distributed equally between the parties.

Which application as to this case would lead to the same result of prohibited State action as to a fundamental right inproperty, and the unequal protection and application of the laws.

14th Amendment U.S. Constitution
9th Amendment U.S. Constitution

The reference in the statute which refers to existing property, only in relation to misappropriation, clearly contemplates that no provision for equal division in kind is to be made and further, the delegation to the Court, to do what is "proper," prevents the equal application of the laws as to each person, and an improper delegation.

Shelley v. Kraemer, supra

AS TO THE CONTINGENT ANNUITY REMAINDER

II.

THE AWARD TO MAURICE OF THE PORTION OF THE CONTINGENT REMAINDER TO COME INTO AFFECT ONLY AFTER HIS DEATH, IS PROHIBITED STATE ACTION RESTRICTING TRANSMUTATION OF PROPERTY, AND DENYING ROSALIE THE EQUAL PROTECTION OF THE LAWS AND THEIR APPLICATION, AND THE TAKING OF HER SEPARATE PROPERTY WITHOUT DUE PROCESS

This Court has already determined the restrictions on transmutations of property are repugnant to the Constitution.

Wissner v. Wissner, supra
Free v. Bland, supra
Treaty of Guadalupe Hidalgo, (1848 Articles VIII, IX)

The California Constitution Art. I § 21 and California Civil Code § 5107 expressly state that separate property is that property which is owned and possessed before marriage, and that acquired during marriage by gift. . . . and all rents issues and profits therefrom.

Definition of gift and the irevocability thereof are found in §§ 1146, 1148 California Civil Code which state:

> §1146. Gifts denied. A gift is a transfer of personal property, made voluntarily without consideration."
>
> § 1148. Gift not revocable. A gift, other than a gift in view of death, can not be revoked by the giver.

By the terms of the pension agreement, the exercise of the option in writing was irrevocable.

The unpublished Opinion of Respondent Court, wherein it is stated that it can not be said as a matter of law that the "irrevocable gift" of the remainder was a gift as a matter of law, is more than "error." This unsupported statement, in fact and law, is a clear taking of Rosalie's property without due process of law, and a denial to her of the equal protection of the laws. Such restrictions on transmutation are prohibited.

Section 4800(a)(b) confers jurisdiction on a court of dissolution only as to the community assets and obliga-

tions to the parties.

The law of the State of California, *In re Marriage of Stenquist*, (1978), 21 Cal.3d 779, decided and filed August 8, 1978 before Petitioner's hearing in the Supreme Court of California was denied, expressly states that unlike other community assets, a spouses rights in pension payments, of a community nature, ends on the death of either spouse.

And, the precise arguments and citations set out in Stenquist were, and a part of petitioner's record on appeal.

Both the evaluation of Rosalie's separate property annuity and the award of one half thereto to Maurice, was beyond the jurisdiction of the court and repugnant to the Constitution and Treaty of Guadalupe Hidalgo.

Nor can the attempt to award to her the remainder of her separate property annuity, of less than one half, which she may never receive, escape the repugnancy, that Rosalie's property was taken and equal division does not exist.

The plain meaning of § 4800(a)(b) permits this division and jurisdiction over Rosalie's separate property, and must therefore fall.

U.S. Constitution 14th, 9th Amendments
Treaty of Guadalupe Hidalgo

Not only has an equal division not occurred, there has been no division of the community assets, all of which were awarded to maurice and the Court has affirmed the award to Maurice of Rosalie's separate property.

III.

THE GIFT OF THE CONTINGENT ANNUITY AND COMPLETE ASSIGNMENT OF THAT RIGHT MADE ROSALIE A PARTY TO THE FOX CONTRACT, WHICH RIGHTS COULD NOT BE INFRINGED, BY PROHIBITED STATE ACTION.

By State law, the irrevocable assignment of a right or a gift made pursuant to a contract, assures the assignee or donee thereof of rights under the contract.

Rosalie's rights under the Fox Contract as of May 1974, when they became irrevocable, could not be changed or impaired by the Court.

Article 1 § 10 U.S. Constitution

Neither Maurice nor his heirs can be awarded rights in that contingent annuity.

The order of sale of Rosalie's home, by which Maurice is to be delivered immediately, the award of Rosalie's separate property of the annuity remainder, is to be accomplished by the sale of the High Knoll home, also separate property, to which no value was assigned at the time of trial as required by § 4800 California Civil Code.

Not only is this order or judgment void by the supremacy clause of the Federal Constitution as a restriction on transmutation, but is a flagrant taking of Rosalie's property, without due process of law.

5th, 9th, 14th Amendment U.S. Constitution

The only standard set forth in California Civil Code § 4800(a)(b) mandates that value be determined before or at trial as is practicable.

It is clear evaluation can not be determined thereafter.

The purpose and necessity for such evaluation is to determine if the property has been equally divided.

California Rules of Court, Rule 1202 states that "shall is mandatory."

Evaluation shall be provided in the findings of fact and conclusions of law.

In re Marriage of Frapwell (1975)
49 Cal. App.3d 597

The refusal of the trial court to make such findings and conclusions, and the statement of the Respondent Court, in its opinion, that such action was not necessary, resulted in prohibited State action whereby Rosalie's property was taken without due process of law and she was denied the equal protection of the laws. The award of the proceeds from the sale to Maurice leaves Rosalie without any part of that asset.

Further, her rights guaranteed by the Treaty of Guadalupe Hidalgo were violated by State action, repugnant to the Federal Constitution.

No State interest exists whereby these rights could be derrogated.

Free v. Bland, supra

IV.

ARTICLE I SECTION 10 UNITED STATES CONSTITUTION AND THE TREATY OF GUADALUPE HIDALGO PROTECT THE CONTRACTUAL PROPERTY RIGHTS OF ROSALIE UNDER THE FOX PENSION GIFT OF THE ANNUITY.

The irrevocable gift, in writing, of the election under the option provided to Rosalie, rights under the contract as either a donee or creditor beneficiary.

It is not crucial or necessary that the exact rights be determined as those rights, by contract, are completely vested and irrevocable.

The irrevocability of those rights are stated in California Civil Code §§ 1146 and 1148, and Maurice by his election estopped from asserting otherwise.

California Evidence Code §§ 623, 622

Contrary to the Opinion of Respondent Court, the trial court was restricted and prevented by the Federal Constitution and the Treaty of Guadalupe Hidalgo and lacked jurisdiction to award Maurice Rosalie's separate property.

Frazier v. Tulare County Board of Retirement
(1974) 42 Cal. App.3d 1046
Art I § 10 United States Constitution

Respondent Court's statement in its unpublished opinion whereby it declares Court action is permissible to change, and direct the change and revocation of the express terms in a contract, is prohibited State action which needs no incorporation in the 14th Amendment for its repugnancy, and is a Federal Question already decided by this Court.

McCullough v. Virginia, 172 US 102 (1898)

This fundamental right is also protected by the 9th and 14th Amendment of the United States Constitution, a further compelling reason for review.

Rights under employment agreements which contain pension plans, and which are, by their terms exclusively within the control of the employee spouse, are divided and computed on speculative actuarial tables by the Courts of California, by the authority of section 4800(a)(b) California Civil Code.

No distinction is made as to a mature pension or one that is unmature and may never accrue. Substantially different decisions and results occur not only in the same district of the State, but the same Courts in the district.

Express prohibitions, on the state action and the guarantees of the United States Constitution, require that

section 4800 Calif. Civ. Code include specific and designated guidelines for existing assets, mature assets, unmature assets, and the other property rights protected, by Federal guarantees, the division of to effectuate equal division.

The delegation to the different trial courts, of discretion to "do what is proper" has resulted in discriminatory decisions on the basis of personality and not on guidelines which are not tainted with repugnancy.

It is this Court, which is mandated by the Constitution is compelled to exercise jurisdiction to protect those rights guaranteed by Federal Constitution and the Treaty of Guadalupe Hidalgo which, guarantees to the citizens and residents of California even greater rights than other common property states.

Devices to prevent access to this Court can not be condoned when substantial Federal Questions, some of which have already been presented to this Court and, decided contrary to the Respondent Court in this matter, rise.

The necessity for stability in property and knowledge and reliance on rights guaranteed as well as confidence and respect for the judicial system compels review of the state action.

AS TO THE UNMATURE COUNTY PENSION

V.

THE EVALUATION OF THE UNMATURE COUN TY PENSION OF ROSALIE'S ACTUARIAL LIFE EXPECTANCY OF OVER 20.5 YEARS AFTER MAURICE'S ACTUARIAL DEATH IN AUGUST 1981 AND THE AWARD TO HIM OF ONE HALF

IMMEDIATELY IS REPUGNANT TO THE CONSTITUTION. ROSALIE CAN NOT BE AWARDED HER CONTINGENT SEPARATE PROPERTY IN LIEU OF A COMMON ASSET, FOR EQUAL DIVISION.

Both spouses are required to assume the risk that an unmature pension will never accrue.

The risk placed on Rosalie alone is prohibited by the mandate that the laws be equally applied and construed and the property, which is common, be divided equally.

14th, 5th and 9th Amendment U.S. Constitution

In re Marriage of Brown, (1976) 15 Cal.3d 838
In re Marriage of Skaden (1977) 19 Cal.3d 679
In re Marriage of Waite (1962) 6 Cal.3d 461
In re Marriage of Stenquist (1978) 21 Cal.3d 779

The refusal to apportion the unmature pension as to separate and community interests, results in the award to Maurice of Rosalie's separate property for the term after his death and during separation.

Calif. Civ. Code 5118, 5107
In re Marriage of Bouquet, 1976
16 Cal.3d

The consitutional requirements of equal division re quire equal standards to be set out in the legislation whereby the guarantees of the supremacy clause can not be violated by discretionary action of the State.

Nor is there any authority, in that unpublished Opinion whereby the Respondent Court can support the affirma-

tion of the trial Court, including any applicable and appropriate state grounds, to support such a decision and award.

Phillipson v. Board of Administration does not apply on its facts and it is expreslly discredited in application and consideration by the Supreme Court of California.[6]

In re Marriage of Stenquist, [1978] 21 Cal.3d 779

Phillipson v. Board of Administration 3 Cal.3d 32

Respondent Court's opinion wherein it states that Maurice's right to have delivered to him immediately one half the present evaluation of the unmature County pension, to be effectuated by the sale of Rosalie's home or the alternative awards to Maurice's heirs as a bank account, is repugnant to the Supremacy clause of the Federal Constitution.

Rosalie's separate property, in that pension, is not subject to evaluation nor award by the court in dissolution.

To the extent that the pension was not apportioned on separate and common property basis and both parties are not required to accept the risk that the asset will not mature, it is unequal application and construction of the laws and a taking of Rosalie's property, without jurisdiction, and without due process of laws, including right to enjoyment, possession and to give it away should she so desire.

[6] Respondent Court's misplaced reliance on *Phillips v. Board of Education*, 3 Cal.3d 32 (1970) which concerned a fully matured pension where no election had been made by the husband employee spouse due to the circumstances that he had left the State with his mistress and had taken with him all of the community assets, and apparently separate property assets of the wife. The Court awarded the whole of the mature pension to the injured wife. See explanation in *In re Stenquist.* § 4800 Calif. Civ. Code.

In re Marriage of Bouquet (1976) 19 Cal.3d 538

In re Marriage of Stenquist, (1978) 21 Cal.3d 779

Waite v. Waite 6 Cal.3d 461

On proper and directed apportionment, Maurice would be entitled only to one half (1/2) the five tenths community interest (5/10) which may accrue in June of 1980, of $220 each month, or about $55 monthly.

The date of commencement of evaluation is that when it matures and it terminates on Maurice's actuarial death in August 1981.

In re Marriage of Wilson, 10 Cal.3d
In re Marriage of Stenquist, *supra*

One half of the common interest of $110 monthly, or about $55 from June 1980 to August 1981 is less than $900.

Contingent on maturation, by change in legislation, on which the pension is predicated, Rosalie's survival, continued employment with the County, the equal protection of the laws and their application, and the mandates of equal division require that both parties take the risk of non maturation.

Neither Maurice nor his heirs have any interest in Rosalie's separate property after his death.

The evaluation, and award to maurice, of Rosalie's separate property is repugnant to the Supremacy clause of the Federal Constitution.

Respondent Court's opinion which affirms such prohibited state action is repugnant to the Federal Constitution and the Supremacy Clause.

Waite v. Waite, supra
California Civil Code §5118
In re Marriage of Bouquet (1976) 16 Cal.3d

Thus Rosalie's rights to her separate property, awarded to Maurice immediately, and the fact that by many contingencies the pension may never mature, and the lack of guidelines as to the requirement that both parties must take the risk of non maturation whereby enjoyment and possession is equal, § 4800(a)(b) is repugnant to the Constitution and the Treaty of Guadalupe Hidalgo, and must fall.

VI.

THE COURT'S EXERCISE OF THE RIGHTS BY CONTRACT EXCLUSIVELY ROSLAIE'S, IN THE UNMATURE COUNTY PENSION IS PROHIBITED BY ART. I § 10 U.S. CONSTITUTION AND IS REPUGNANT TO THE TREATY OF GUADALUPE AND THE UNITED STATES CONSTITUTION.

The exclusive rights to direct the pension its direction and to designate the beneficiaries thereunder is Rosalie's exclusive right.

Respondent Court's unpublished opinion, in which about four pages, pp. 8-14 are used to justify this action, prohibited by the Constitution, can not cure the prohibition as to impairment of contractual rights and repugnancy.

In re Marriage of Stenquist, *supra*
Frazier v. Tulare Board of Administration, supra

VII

SECTION 5110 CALIFORNIA CIVIL CODE RESTRICTS TRANSMUTATION OF PROPERTY AND DENIES ROSALIE THE RIGHT TO HOLD PROPERTY SEPARATELY, AS JOINT TENANTS OR TENANTS IN COMMON, AND DENIES TO HER RIGHTS GUARANTEED BY THE 14TH AMENDMENT AND TREATY OF GUADALUPE HIDALGO.

Maurice's exclusive control over the issuance of the 1973 deed, and the express negation on the face of the deed of community property is contrary, to the Opinion of Respondent Court that on its face the deed presumes community property.

By Constitutional mandate Rosalie's right to hold her property as any other person in California can not be violated.

14th, 5th, 9th Amendment US Constitution
Treaty of Guadalupe Hidalgo
Free v. Bland
Wissner v. Wissner
Dunn v. Mullan, supra

The rights of a wife to hold property as separate property, joint tenancy, tenancy in common, or in the same manner as any other person or citizen, is found firmly established in California Statutes, and its Constitution.

California Civil Code §§ 5103, 5104, 5105, 5107
California Constitution Article 1 §§ 21, 26
Treaty of Guadalupe Hidalgo

The law of California is explicit that a presumption is not evidence.

California Evidence Code § 600, 601.

The deed of acquisition of High Knoll states in part as applicable, as follows:

> " . . . to Maurice R. Morton and Rosalie L. Morton, husband and wife as joint tenants, not as community property not as tenants in common."

Contrary to the Opinion of Respondent Court, where its statement that the face of the deed presumes community property, the face of the deed, by the very contrary intent, as noted in § 5110 of the California Civil Code presumes the property is joint tenancy and therefore not subject to the jurisdiction of a court of dissolution.

Commencing with Cal Stats 1889 c 219 p 328, enacted to comply with the Treaty of Guadalupe Hidalgo, a conveyance in writing to a married woman presumed it was separate property, and this statute is now enacted as section 5110 California Civil Code.

The law is contrary to the statement of the Court in the unpublished Opinion, Maurice's secret intent to take Rosalie's property and use it for his own benefit is not ient to overcome the presumption on the face of the deed.

Gudelj v. Gudelj [1953]
41 Cal.2d 202, 259
In re Marriage of Frapwell [1975]
49 Cal. App.3d 597
Owings v. Lougharn (1942) 53 Cal. App.3d 789

Maurice's concession that he did not overcome the presumption on the face of the deed and that Rosalie did, is in conformity with the settled law that his assertion that community funds were used by him for the downpayment, is not sufficient to overcome the presumption of the deed of separate property. Transmutation car. not be defeated thereby.

Hansford v. Lassar (1975) 53 Cal. App.3d 364

The insolvency of the community, and its near bankruptcy, the unavailability of community assets for the purchase, the use of Rosalie's separate property funds for the purchase, the tracing of those funds from separate bank accounts used for those funds alone, and the negation of comingling, clearly established both of the two acceptable methods of proof whereby High Knoll is Rosalie's sole and separate property.

In re Marriage of Mix (1975) 14 Cal.3d 605
In re Marriage of Jafeman (1972) 29 Cal. App.3d 244
Hansford v. Lasser, supra
Liodas v. Sahada (1977) 19 Cal.3d 278
In re Marriage of Kitscher (1978) 79 Cal. App.3d 529

Nor does Maurice's demand to handle the escrow transaction whereby he caused the deed in joint tenancy to accrue to his interest by his wrongful act and breach of fiduciary relationship rather than as Rosalie's separate property, afford him rights.

California Civil Code §§ 5103, 2223, 2224
38 ALR3d 1354, 1369

His joint tenancy interest as stated on the face of the deed is held in trust for Rosalie as a constructive trustee.

The one thing High Knoll is not, is community property, and therefore not subject to the jurisdicion of the Court, on dissolution.

From the equal rights, guaranteed by the Treaty of Guadalupe Hidalgo and Federal Constitution, the forerunners of § 5110 California Civil Code, Respondent Court has regressed to the position that the wife has no vested, or legal, rights in property and any conveyance by her of her own property requires concurrence by her husband spouse. And she is precluded from holding property as guaranteed by section 5107, 5104, California Civil Code. Maurice's interest is not controlling.

Strong v. Strong [1943]
22 Cal.2d 540

To date no legislation gives a state or court the discretion to make an independent determination as to the status of property in its benevolency.

Such determination can not but result in the excess of jurisdiction over that property, and an unequal division of even common property.

This prohibited State action whereby the Court takes jurisdiction over the separate property, is repugnant to the Constitution and Treaty of Guadalupe Hidalgo.[7]

Free v. Bl d, supra

Respondent Court could neither order the sale of the property nor award the proceeds to Maurice.

Robinson v. Robinson, supra
Johnson v. Johnson, supra

Marriage alone did not confer the court with the discretion to determine the nature and status of property, contrary to stare decisis, and the express statement of the deed.

[7] Had High Knoll been community property by any theory at all, which is not the case, the concealed deed executed by Maurice before trial in August 1975, would have resulted in the property being held in Tenancy in Common and the Court would still not have had jurisdiction over the property, in a dissolution proceeding.

In its benevolent discretion, the poor wife may be awarded the whole of a husband's separate property, because he is wealthy from efforts prior to marriage, and because he drew on separate funds to pay community debts rather than risk judgment and execution.

See v. See (1964)[8]64 Cal.2d 778

It was only this Court, on application, which to date has determined the Federal Questions of vesting, and discrimination on the basis of sex, age, or classifications which were non governmental concerns, which has the consitutional mandate to consider and determine the substantial Federal Questions.

Free v. Bland, supra
Yiachos v. Yiachos, supra
Stanton v. Stanton, supra

Certiorari should be granted to review the unpublished opinion and judgment, to require legislative guidelines in conformity to the guarantees of the United States Constitution and the Treaty of Guadalupe Hidalgo, which Respondent Court has refused to recognize, and to provide Petitioner with those guarantees mandated by the Federal Constitution.

The equal control of common property by legislation after 1975, California Civil Code §§ 5105, and 5125, have done no more, than finally, recognize the equal property rights previously guaranteed by the Treaty of Guadalupe Hidalgo.

[8] Although cited by the Court for this proposition whenever necessary to support an erroneous or void decision, a presumption has not been evidence since 1965, and those courts bound by logic, reason and stare decisis have in effect impliedly overruled. See *In re Marriage of Jafeman, supra, In re Marriage of Mix, supra.*

These rights, which by prohibited state action have been violated by Respondent Court, to petitioner's detriment and injury, are coexistent with and identical to those rights proclaimed by Amendment XXVII (proposed) to the United States Constitution.

Any necessity to redetermine, by reason of an Amendment to the United States Constitution, existing rights is plenary evidence that, by prohibited State action, such rights have been consistently derrogated in California, and this Court , is mandated by the United States Constitution and the Treaty of Guadalupe Hidalgo, to grant certiorari to resolve the Federal Question.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the Court of Appeals, Second Appellate District Division One, and to grant a Stay of that judgment and the whole thereof, pending said determination.

Respectfully submitted,

ROSALIE L. MORTON, in Pro Se

Counsel for Petitioner

c/oN.E. Youngblood, Esq.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

SECOND APPELLATE DISTRICT

DIVISON ONE

In re the Marriage of ROSALIE L. AND MAURICE R. MORTON

MAURICE R. MORTON,

Respondent,

v.

ROSALIE L. MORTON,

Appellant.

2 Civil No. 52725
(Super Ct. No. D-869439)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald E. Swearinger, Judge. Affirmed.

N.E. Youngblood for Appellant.

Irwin R. Miller for Respondent.

APPENDIX A

Rosalie Morton appeals from an interlocutory judgment of dissolution of marriage.[1] Notwithstanding the voluminous record before the court the facts of the matter and the issues on appeal are not complicated.

Maurice Morton and Rosalie Loveman were married September 1965 and separated in May 1975. No children were born of the marriage; each of the parties had at least one child by a former marriage. Each of them was in debt for several thousand dollars. Rosalie owned improved real property, the Canfield house, worth about $65,000, encumbered to the extent of approximately $19,000; and held a secured promissory note in the amount of roughly $40,000. Both items were received by her as her share of community property when her marriage to Bernard Loveman was dissolved. Rosalie was admitted to the California bar in 1965; she worked first for the city attorney's office, was later in private practice, and since May 1970 has been with the district attorney's office. Maurice held a degree in law, though he had never practiced. He was employed as an executive with Twentieth Centuy Fox Film Corporation. In 1965 he earned some $43,000. His income rose to over $68,000 in 1973, his last full year with Twentieth Century Fox.

Beginning shortly after the marriage and continuing throughout its course, the parties, individually and jointly made a series of loans. Several of these loans were secured by the Canfield house. When it was sold in August 1972 net proceeds amounted to only $4,086.

Rosalie accused Maurice of failure to account, mismanagement and misappropriation of both her separate property and community property. After an eight-day

[1]She also appeals from order requiring her to turn over to Maurice certain items of personal property pending appeal; appellant concedes that such appeal is now moot.

hearing the court concluded that such claims were without merit. There is substantial evidence to support this conclusion.

Maurice testified at length regarding the disposition of property during the marriage. All the available financial records were produced[2] and discussed at length. Lee Winkler, who was Maurice's business manager for more than two years, and Rosalie's for a somewhat shorter period, summarized: "They just never, never, never could make ends meet, even with both their incomes."

One item of expenditure to which Rosalie objected was Maurice's financial assistance to his daughter by a previous marriage. It was shown, however, that Rosalie knew of and participated in such expenditures, and that two of her own children by a previous marriage were similarly assisted.[3]

Rosalie attempted to characterize as loans to Maurice various transactions whereby her separate property was used to satisfy community obligations. The court did find that $3,500 was loaned to Maurice, but as to the remaining instances in which separate property was used for community purposes no agreement to repay was found. In the absence of such an agreement, one permitting the use of his separate property for community purposes is not entitled to reimbursement from the community or the separate property of the other spouse. (*See v. See*, 64 Cal.2d 778, 785.)

[2]Appellant complains that Maurice failed to produce certain bank records. Maurice stated, however, that he had produced all records within his control.

[3]A party may be estopped to assert the requirement of Civil Code section 5125, subdivision (b) that a gift of community personal property be made for a valuable considerationor with the written consent of the other spouse. (See *Vierra v. Pereira*, 12 Cal.2d 629, 632; *Mark v. Title Guarantee etc., Co.*, 122 Cal.App. 301, 310.)

No purpose would be served by repeating the extensive evidence regarding the community's use of funds. It appears that Rosalie was entirely too free with her accusations of misdealing. As the trial court stated in its memorandum of intended decision: "[I]t appears from the evidence that these claims and contentions [that Maurice misappropriated or misused certain monies] are a sham, being recklessly made accusations without any basis of fact whatsoever. The respondent [Rosalie] has indicated during the trial that she has not understood 'where all the money went,' during the marriage. If she were listening to the evidence she should now know."

The court made the required findings of fact; the findings are sufficient, and are supported by substantial evidence. The trial court is required, upon request, to make findings of fact on all *material* issues raised by the pleadings. (Civ. Code, § 632; *Coronet Credit Corp. v. West Thrift Co.*, 244 Cal. App.2d 631, 647.) This the court did.[4] The court accepted Maurice's testimony and for the most part rejected Rosalie's.[5] Even if it stood alone Maurice's testimony would constitute substantial evidence for the court's findings because there is nothing inherently improbable about it. (See, e.g. *Mitchell v. Southern Cal. Gas Co.*, 122 Cal. App.2d 692, 697.) It is

[4]Appellant complains of the lack of a finding with respect to a $15,000 insurance policy on respondent's life. The only evidence with respect to this policy was Maurice's testimony that it had no cash value. Failure to make a finding where the finding must have been adverse to the complaining party is not error. (*Jackson v. Crowley*, 199 Cal. App.2d 390, 393.)

[5]The court expressed itself in no uncertain terms, saying at one point late in the proceedings: "Mrs. Morton, you know this characterization of your husband as a Svengali and yourself as some sort of a Trilby just really doesn't go over.(¶) Do you understand that I find it incredible to believe the things that you tell me about your innocence in financial matters? And I am frankly getting awfully tired of it."

no objection to the findings to say that there was substantial evidence to support contrary findings.

The trial court did not err in failing to require Maurice to make a proper or any accounting as a fiduciary. If at no other time, Maurice did make a full accounting at the time of trial. However, he also testified that, for example, he had on various occasions orally accounted to Rosalie, and also that there was effectively an annual accounting when the parties' income tax returns were prepared.

Nor did the trial court err in imposing upon appellant the burden of showing disposition of funds by respondent while acting as a fiduciary re community assets and her separate assets. In fact, the court recognized that it was the duty of Maurice to account; it found that he had adequately accounted. After the accounting was made the burden was on Rosalie to show wherein its inadequacy lay. She failed to sustain this burden.

The finding that the High Knoll residence was community property is suffficiently supported by the evidence. In 1973 the parties purchased a residence in Encino referred to as the High Knoll house, taking title thereto as joint tenants. The taking of title in this manner gives rise to a presumption that the property is community property. (Civ. Code, § 5110.) Rosalie claimed that the down payment for the house came from her separate property. and that it was intended that the house be her separate property. Maurice denied that this was the parties' intention; he testified that the down payment came from income tax refunds to the community. That there were such refunds in an amount adequate to make the down payment was borne out by Maurice's financial records.

There was no abuse of the trial court's discretion in dividing the community property interest in two retirement benefit plans based on present value as determined by

actuarial computation. Maurice retired and began receiving retirement from Twentieth Century Fox in 1974. Under the option selected by him he would receive $1,083.67 a month for life and after his death Rosalie would receive $541.54 per month for the balance of her life; the option was irrevocable. Medical testimony indicated that because of severe coronary artery disease Maurice's life expectancy was less that half that otherwise indicated for a man of his age (62); the court found his actuarial life expectancy to be approximately 6.5 years. According to standard life expectancy tables Rosalie's life expectancy at age 53 was 27.1 years.[6] Based on these life expectancy figures Maurice's expert witness computed the present cash value of his retirement benefits to be $123,761 — $70, 318 being the value of benefits payable during Maurice's life and $53,443 the value of the remainder (joint and last survivor annuity) to Rosalie. Nine-fourteenths of the retirement benefits constituted community property. Maurice was awarded the community interest in the remainder, $34,353, with an adjustment in other property to equalize the award; the court found the remaining $19,085 value of the remainder interest to have been a gift to her.

It is within the discretion of the trial court to determine the appropriate manner of dividing retirement benefits. (*In re Marriage of Brown,* 15 Cal.3d 838, 848, fn. 10.) Usually two alternatives present themselves — the actuarial fixing of present cash value, and the division of each pension payment as it is made to the pensioner. Appellant urges that the latter was the more appropriate choice because the actuarial method places on her the risk that

[6]Appellant objects that there was no evidence that standard life expectancy tables accurately reflected her life expectancy. If there were any reason to expect appellant to differ from the norm it was up to her to come forward with such evidence.

she may predecease Maurice and thus receive none of the benefits of his pension program. The alternative she suggests, however, would mean that she would share in Maurice's monthly payments and then have the entirety of the payments after his death. Faced with this choice it is clear that the court's discretion was properly exercised. Indeed, *Phillipson v. Board of Administration,* 3 Cal.3d 32, 46, describes the award of equal value to the spouse, as the preferred mode of division. But appellant argues that the value of the remainder was not subject at all to disposition by the court because when Maurice elected this option the remainder to her constituted an irrevocable gift, her separate property. However, we cannot say that, as a matter of law, the election of the option providing a remainder to Rosalie constituted a gift thereof, for one thing, donative intent is doubtful. And Maurice's testimony relative to conversations with Rosalie regarding which option would be best for them rather undermines than supports the claim that the remainder was to be enitrely a gift to appellant.

Appellant raises similar objections to the court's disposition of her pension. Five-sixths of appellant's interest in the Los Angeles County Employees Retirement Plan was community property. To draw retirement benefits Rosalie must have been a member of the plan for ten years, have five years of county service and have attained 50 years of age. The only requirement Rosalie lacked at the time of dissolution was the ten years of plan membership which will have been satisfied by May 1980.[7] The present cash

[7]It is clear in the context of retirement pensions that a "vested" but "immature" pension right is property subject to division upon dissolution to the extent of its community character. (*In re Marriage of Brown*, 15 Cal.3d 838, 847; *Smith v. Lewis*, 13 Cal.3d 349, 355, fn. 4.)

That appellant might elect to withdraw her contributions to the pension plan instead of opting for retirement benefits does not prevent

value of the pension was figured on the basis of Rosalie's contributions to the time of separation. Taking the ten-year membership requirement to be satisfied in 1980, the value was computed to be $39,300 based on a life expectancy of 23.1 years from the time Rosalie could begin drawing benefits. Rosalie was awarded her entire pension with Maurice receiving an equivalent award from other property.

Appellant asserts that the action of the trial court imposes upon her the risk that the pension may not mature, for example due to termination of employment prior to 1980. She submits either that the court should have retained jurisdiction until the pension benefits matured at which time she and Maurice would each be entitled to half of the benefits attributable to the period of employment during overture as they are paid, or that the court should have awarded Maurice half of the amount of her contributions to the pension plan made during marriage. In view of the precarious state of Maurice's health, the first alternative would shift to him not only much of the risk that the pension might not mature but the more certain possibility that he would not live to collect more than a few years' benefits from the pension once matured. The second alternative, of course, would deprive him entirely of the benefit of the pension program by treating it as an ordinary savings account. We do not think that the uncertainties affecting the maturation of Rosalie's pension rights were such as to make the court's disposition thereof an abuse of discretion.[8] (See *In re Marriage of Skaden*, 19

the court from requiring that "benefits be case in whatever from is most useful to the community." (*Phillipson v. Board of Administration*, 3 Cal.3d 32, 38.)

[8]Factors which might prevent maturation of pension rights do not preclude actuarial computation of present value. (See Projector, Valuation of Retirement Benefits in Marriage Dissolutions (1975) 50 L.A. Bar Bull. 229.)

Cal.3d 679, 688.)

The trial judge did not become an advocate for Maurice. The court did take a fairly active role in the examination of various witnesses, but its questions show a conscientious effort to unravel the various issues raised during the course of a lengthy proceeding. No objection was interposed to the court's procedure. Nor does the fact that the court candidly expressed its disbelief of Rosalie's profession of ignorance as to the course of the couple's financial affairs indicate bias. One example which may have led the court to its conclusion relates to the disposition of the $36,000 received from discounting the Loveman promissary note. To begin with, Rosalie had complained that she did not know what had happened to a $21,000 check (part of the $36,000) even though she herself had signed both the check and the bank deposit slip for it. Then she denied knowledge of where this money had gone, yet the checks drawn on the joint checking account in which the money was deposited not only showed in detail how the money had been spent but also that Rosalie herself had disposed of approximately $14,000 of it to various members of her family. Her credibility was also undermined by testimony that she had on various occasions accused her business manager, former law partner, and previous husband of either mismanagement of funds or fraud. The court's disbelief of the bulk of her testimony thus hardly signifies bias on its part.

It is only to be expected that in more than two hundred and fifty pages of briefs appellant would have raised some inconsequential issues. To the extent these issues have not

been expressly addressed, it should be noted that they have been considered and found totally lacking in merit.

The judgment is affirmed.

LILLIE, Acting P.J.

We concur:

THOMPSON, J.
HANSON, J.

UNITED STATES CONSTITUTION

NINTH AMENDMENT

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

ARTICLE I § 10

"No state shall enter into any Treaty, Alliance or confederation; grant letters of Marque and reprisal . . . . ; pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts . . . . "

FIFTH AMENDMENT

"No person shall . . . . nor be deprived of life, liberty, or property, without due process of law . . liberty, or property, without due process of law . . . ."

FOURTEENTH AMENDMENT

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are Citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

TWENTY-SEVENTH AMENDMENT
(Proposed)†

Section 1: Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3: This amendment shall take effect two years after the date of ratification.

CALIFORNIA CONSTITUTION

ARTICLE I § 1

"Section 1: All people are by nature free and independent and have inallienable rights. Among those are enjoying life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy."

ARTICLE I § 3

Section 3: The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good. (Added Nov. 5, 1974.)

ARTICLE I § 21

"Section 21: Husband and wife. separate property. Property owned before marriage or acquired during marriage by gift, will, or inheritance is separate property."

ARTICLE I § 26

Section 26: Mandatory and prohibitory provisions; "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared otherwise."

ARTICLE III § I

Section I: Constitution of the United States supreme law of land.

Section I: The State of California is an inseparable part of the United States of America, and the United States Constituion is the supreme law of the land.

Section 3: Enumeration: exercise

Section 3: The powers of state government are legislative, executive and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this constitution.

ARTICLE I § 7

Section 7: "Due process and equal protection: privileges and immunities."

(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.

(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the legislature may be altered or revoked.

STATUTES INVOLVED

CALIFORNIA CIVIL CODE

Section 4800: Division of community and quasi-community property; (a) time of division; equality; valuation; except upon the written agreement of the parties, or an oral stipulation of the parties, in open court, the court shall either in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such property division, divide the community property and quasi-community property of the parties, including any such property from which a homestead has been selected, equally. For purposes of making such division the court shall value the assets and liabilities as practicable to the time of trial, except tht upon 30 days notice by the moving party to the other party, the court for good cause shown, may value all or any portion of the debts and liabilities at a date after separation and prior to trial to accomplish an equal division of the community property. . . "

(b) Manner of division: Notwithstanding subdivision (1) the court may divide the community property and quasi community property of the parties as follows:

(a) Where economic circumstances warrant, the court may award any asset to one party on such conditions as it deems proper to effect a substantial equal division of the property.

(b) As an additional award or offset against existing property, the court may award from a party's share, any sum misappropriated by

such party to the exclusion of the community property or quasi community interest of the other party.

Section 5103: (Property transactions between spouses or with other person; Rules governing confidential relations.) Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves to the general rules which control the actions of persons occupying confidential relations with each other, as defined by Title 8 (commencing with section 2215) of part 4 of Division 3.

Section 5104: (Joint ownership or community property) A husband and wife may hold property as joint tenants, tenants in common, or as community property.

Section 5105: (Interests in community property) The respective interests of the husband and wife in community property during the continuance of the marriage relation are present, existing and equal intersts. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

Section 5107: (Wife's separate property, and conveyance thereof) All property of the wife, owned by her before marriage and that acquired afterwards by gift, bequest, devise, or descent, with the rents issues and profits thereof, is her separate property. The wife may, without the

consent of her husband convey her separate property.

Section 5110: (Other real property situated in this state) Community Property; presumption as to property acquired by wife; limitations of actions; leasehold interests.

Except as provided in sections 5107, 5108, and 5109, and subdivision (c) of Section 5122, all real property situated in this state, and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state, and property held in trust pursuant to Section 5113.5, is community property, but whenever any real or personal property, or any interest therein or encumberance thereon, is acquired prior to January 1, 1975 by a married woman by an insturment in writing, the presumption is that the same is her separate property, and if so acquired by such married woman and any othe person the presumption is that she takes the part acquired by her as tenant in common, unless a different intention is expressed in the insturment; except that when any of such property is acquired by husband and wife by an insturment in which they are described as husband and wife, unless a different intention is expressed in the insturment, the presumption is that such property is community property of said husband and wife . . . . "

Section 5118: Separate property; earnings of spouse and children after separation.

The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and

apart from the other spouse are the separate property of the spouse.

Section 5125: Community personal property; management and control; restrictions and disposition.

(a) Except as provided in subdivisions (b)(c) and (d) and sections 5113.5 and 5128, either spouse has the management and control of the community personal property, whether acquired on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

(b) A spouse may not make a gift of community personal property or dispose of community personal property without the written consent of the other spouse.

(e) Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property.

Section 1146: Gifts defined. A gift is a transfer of personal property, made voluntarily, and without consideration.

Section 1148: Gifts not revocable. A gift, other than a gift in view of death, cannot be revoked by the giver.

Section 2223: Involuntary trustee, who is one who wrongfully detains a thing is an involuntary trustee therefore, for the benefit of the owner.

Section 2224: (Involuntary trust resulting from fraud, mistake, etc.) One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful acts, is

unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would have otherwise have it.

Section 2235: Presumption against trustees: Exceptions. All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence. The presumptions established by this section do not apply to the provisions of an agreement between a trustee and his beneficiary relating to the hiring or compensation of the trustee.

Section 2236: (Trustee mingling trust property with his own) A trustee who wilfully and unnecessarily mingles the trust property with his own, so as to constitute himself in appearance its absolute owner, is liable for its safety in all events and for the value of its use.

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Section 600: Presumption and inference defined.

(a) A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.

(b) an inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established inthe action.

Section 601: Classification of presumptions. A presumption is either conclusive or rebuttable. Every rebuttable presumption is either:

(a) a presumption affecting the burden of producing evidence or

(b) presumption affecting the burden of proof.